United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

SUPPLEMENTAL APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,040

HERBERT HARVEY, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review an Order of
The National Labor Relations Board

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SUPPLEMENTAL APPENDIX

171 NLRB No. 36

D-855
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

HERBERT HARVEY, INC.

and

Case No. 5-CA-3583

GOVERNMENT SERVICE EMPLOYEES' UNION, LOCAL 536, BUILDING SERVICE EMPLOYEES' INTERNATIONAL UNION, AFL-CIO

SUPPLEMENTAL DECISION

On June 13, 1966, the National Labor Relations Board issued a Decision and Direction of Election[1] finding, contrary to the primary contention of the Respondent, that the Respondent's operations were not so intimately connected with the purposes and operations of the World Bank[2] as to warrant the withholding of the exercise of the Board's jurisdiction over the Respondent's operations. After an

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[1] 159 NLRB 254.

[2] The International Bank for Reconstruction and Development, located in Washington, D. C.

election duly conducted on August 5, 1966, the Board, on August 15, 1966, certified the Government Service Employees' Union, Local 536, Building Service Employees International Union, AFL-CIO, as the exclusive bargaining representative of employees in the appropriate unit. On August 16, 1966, the Respondent informed the Union that it would not engage in collective bargaining in order to obtain judicial review of the Board's decision asserting jurisdiction over the Respondent's operations. On January 12, 1967, the Board granted the General Counsel's Motion for Summary Judgment and found that the Respondent, by its refusal to bargain with the Union, had violated Section 8(a)(5) and (1) of the Act.

Thereafter, the Respondent, on February 21, 1967, filed with the United States Court of Appeals for the District of Columbia Circuit a petition to review and set aside the Order of the Board and on March 13, 1967, the Board filed a cross-petition for the enforcement of its Order. The Court denied enforcement of the Board's Order and remanded the case to the Board. The Court held that the Respondent and the World Bank were joint employers of the employees involved, and on that premise ruled that the Board had erred in failing to determine whether the World Bank was exempt from the Board's jurisdiction and, if so, whether the Respondent exercised sufficient control over the wages, hours, and other conditions of employment of the employees to enable it to bargain effectively with the Union. The Court also observed that the Board's Decision in this case appeared to be in conflict with prior Board Decisions such as *Crotty Brothers*,[3] *The Prophet Company*,[4] *The Horn and Hardart Company*,[5] and *Specialized Maintenance Services, Inc.*[6]

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[3] 146 NLRB 755.

[4] 150 NLRB 1559.

[5] 154 NLRB 1368.

[6] Case No. 22-RM-222. Not published in NLRB Volumes.

In accordance with the aforementioned remand order, the Board has reconsidered its prior Decision in this case, and makes the following additional findings:

The World Bank was established in 1944 at a conference of 44 nations at Bretton Woods, New Hampshire. The agreement reached at the conference was subsequently accepted by 39 of the 44 participating nations. The agreement established the Bank as an intergovernmental institution, corporate in form, with all of its capital stock being owned by its member governments. In 1947 the Bank became a specialized agency of the United Nations. Under the agreement the Bank enjoys certain privileges and immunities. Thus the governors, directors, officers, and employees of the Bank are immune from legal process for acts performed in their official capacities, and, unless they are local nationals, they are to be accorded the same immunities from immigration restrictions, alien registration requirements, and national service obligations, and the same treatment in respect to travel facilities as are accorded officials of member governments. The archives of the Bank are inviolable and its assets immune from seizure, attachment or execution prior to delivery of final judgment against it. The Bank's official communications are to be accorded the same treatment accorded to official communications of other members.

It is manifest that the World Bank is an international organization which enjoys the privileges and immunities from the laws of the sovereignty in which it is located customarily extended to such organizations. The Supreme Court has held that in the "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed" to support a finding that the Labor Management Relations Act confers jurisdiction upon the Board.[7] We find nothing in the language of the statute or in its legislative history that would lead us to conclude that Congress

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[7] *Benz v. Compania Naviera Hidalgo*, 353 U. S. 138, 147. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10, 21-22.

intended the Board to exercise its jurisdiction over the operations of the World Bank. We therefore find that the World Bank is not subject to the jurisdiction of the Board.

As noted above, the Court held that the World Bank and the Respondent are joint employers of the employees involved. We accept the Court's holding as the law of the case. But this does not end the matter, for, as the Court further held, the question remains whether the Respondent, which is not an exempt employer, retains sufficient control over the employment conditions of the employees to enable it to bargain effectively with the Union. We think the record does support our conclusion that the Respondent is fully capable of bargaining effectively with the Union regarding the wages, hours, and other conditions of employment of its employees.

It is plain that the contract between the World Bank and the Respondent contemplated a completely independent relationship between the parties. Thus paragraph 9 of the contract states:

> 9. It is understood and agreed that the Company [Respondent] (1) will perform the services to be rendered by it hereunder as an *independent contractor*, (2) will be solely responsible for the conduct of *its employees*, agents and servants, (3) and will hold the Bank harmless from any liability, loss or damage arising out of the conduct of the Company, *its employees*, agents, and servants. [Emphasis supplied.]

It is obvious that this clause was intended to make clear that as between the World Bank and the Respondent the Respondent was to be regarded as the Employer with primary responsibility over the employees performing services under the contract. Moreover, this is the only provision of the contract which makes reference to the "employees" who are to perform such services. Thus there is no reservation of rights to the Bank to determine wage rates, to set hours of work, to discharge or hire, or otherwise to exercise authority over the conditions of employment of the employees. And the contract, which, in paragraph 6, obligates the Bank to reimburse the Respondent for "all reasonable costs

paid by the Company directly for the rendering of services by it hereunder" up to a sum fixed by the parties, contains no limitation on the wages to be paid by the Respondent to the employees. In short, the contract discloses that the parties thereto intended that the Respondent should assume complete control over the employees performing the maintenance services in the buildings occupied by the World Bank, subject only to the general strictures of paragraph 2 that the services by the Respondent be rendered "in an efficient, safe and business-like manner and . . . as economically as sound business judgment warrants" and those of paragraph 6 that the "cost" of the services rendered by the Respondent be "reasonable."

The record shows, it is true, that the World Bank has, to an unspecified extent, participated in such matters as the hiring and discharge of employees. It is also true that the World Bank approves year-end raises for the employees, although it is also plain from the record that such raises are routinely agreed to by the Bank. And even though the Respondent's vice-president testified that many requests for promotions had been rejected, she could not recall the last time that such a request had been refused. So far as the record reveals, the extent of the Respondent's acquiescence in the World Bank's participation in the hiring, discharge, and assignment of employees was no more than that which any service company would permit in order to please its clients, and the World Bank's participation in promotions and the setting of wage scales was no more than an exercise of its right to police the costs being incurred under the contract. Indeed, for the World Bank to have participated to any great degree in the employment conditions of the employees would be to interfere with the Respondent's obligation to obtain and retain the competent employees necessary to render the efficient and economical service which it was hired to provide under the contract with the World Bank. We therefore conclude that the Respondent exercises effective control over the working

conditions of its employees and is fully competent to bargain with the Union in accordance with the provisions of the Act.[8]

In response to the Court's observation that the result in the instant case appears to be inconsistent with the Board's prior cases dealing with exempt institutions, it is respectfully submitted that our holding here is in accord with the criteria that the Board has generally utilized in determining whether jurisdiction should be asserted over contractors performing services for such institutions. The Board has, with the possible exception of *Specialized Maintenance Services, Inc., supra*, uniformly held that the assertion of jurisdiction over a contractor providing services for an institution exempted from the process of the Act is dependent upon the relationship of the services performed to the exempted functions of the institution. Where the services are intimately connected with the exempted operations of the institution, the Board has found that the contractor shares the exemption; on the other hand, where the services are not essential to such operations the Board has found that the contractor is not exempt and asserts jurisdiction over the contractor's activities. By so doing the Board is enabled to strike a balance between the Congressional policy of excluding the noncommercial charitable and educational activities of institutions [9] and the policy of the statute to encourage collective bargaining – one of the fundamental purposes of the Act.[10]

[8] The Board has, on several occasions, asserted jurisdiction over cost-plus-fixed-fee contractors with the Federal Government which is, of course, exempted from the Board's jurisdiction by Section 2(2) of the Act. In these cases, although the Federal agency involved retained a right to review and approve the working conditions of the employees doing the work under the contract, the Board found that there was a sufficient "area of effective control over labor relations" remaining in the contractor to enable it to meet its bargaining obligations under the Act. *Great Southern Chemical Corporation*, 96 NLRB 1013, 1014; *American Smelting and Refining Company*, 92 NLRB 1451, 1452; *Reynolds Corporation*, 74 NLRB 1622, 1626, 1630-1632, reversed on other grounds, 168 F.2d 877 (C.A. 5). See also, *N.L.R.B. v. E. C. Atkins & Company*, 331 U. S. 398, 406-414.

[9] *The Trustees of Columbia University in the City of New York*, 97 NLRB 424, 427.

[10] *Woods Hole Oceanographic Institution*, 143 NLRB 568, 574.

In accordance with the above analysis of what it deemed to be the requirements of the Act, the Board, in *Crotty Brothers, supra*, found that it would not effectuate the policies of the Act to assert jurisdiction over an Employer supplying food services to Trinity College. In that case the record showed that 70 percent of the 750 students enrolled at Trinity College were resident students who paid for their board as part of an inclusive fee, together with their tuition and room. The record further showed that the food service was paid out of Trinity's budget for college operations, that Trinity had at one time managed its own food service operation, and that there was no other establishment within a mile of Trinity where the students could obtain their meals. These circumstances, as well as the showing that Trinity exercised substantially complete control over Crotty's operations and labor relations policies, persuaded the Board that Crotty's food service operation was intimately connected with Trinity's noncommercial educational purposes, and that the contractors should share the college's exemption.

The facts in *Prophet Company, supra*, parallel those found by the Board in *Crotty Brothers.* Almost one-half of the 4,800 students at Whitewater State University resided in university housing and were required by the university to subscribe to a board plan which entitled them to a certain number of meals per week. The university had at one time operated its own food service. There were no comparable eating facilities for the students within reasonable distance of the campus, and the university, even after contracting out its food service, explicitly reserved by contract certain supervisory controls over that operation. The Board, as in *Crotty Brothers,* considered the food service to be intimately connected with the educational purposes of the university and therefore did not assert jurisdiction over the operation of the contractor providing the service in accordance with its contract with the university.

In *Horn & Hardart Company, supra*, a contractor was supplying food service to a hospital exempt from the Board's jurisdiction by the Act. The record showed that most of the contractor's operations consisted of supplying food to the hospital's patients, hospital personnel, and senior medical students. The food for patients was subject to the

approval of the hospital dieticians and, in practice, the dieticians prepared the menus and decided the times at which food was to be served to patients. The Board, applying the principles set forth above, found that the food service provided by the contractor was intimately connected with the patient care and medical education purposes of the hospital and therefore did not assert jurisdiction. On the other hand, in a recent case involving a contractor providing maintenance service to a hospital similarly exempt, the Board found that the services provided were not so intimately connected with the care of the hospital's patients as to justify the extension of the hospital's exempt status to the maintenance contractor. The Board therefore asserted jurisdiction over the contractor.[11]

The Court, in its decision remanding this case to the Board, found the Board's original Decision in this case deficient in failing to distinguish an unpublished decision, *Specialized Maintenance Services, Inc., supra*, from the instant case. In *Specialized Maintenance*, the Board, by letter of March 7, 1966, dismissed an administrative appeal from a Regional Director's dismissal of a petition for an election, citing *Crotty Brothers, supra*, and *The Prophet Company, supra*. The contractor in that case was rendering maintenance service to Seton Hall University, but since no record was made in that case because of the dismissal of the petition, it is not possible to apply the underlying principles set forth above to the facts of that case. To the extent, however, that *Specialized Maintenance* may be regarded as in conflict with this and other decisions of the Board, it is hereby overruled.

The foregoing analysis persuades us that our original decision conforms to the statutory purposes and is consistent with the decided cases. The World Bank is an international investment institution engaged in making or guaranteeing loans for productive reconstruction and development projects in the territories of its members. The Bank supplements its investment activities by providing technical assistance of various kinds

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[11] *Bay Ran Maintenance Corporation*, 161 NLRB No. 74.

to underdeveloped member countries. The Respondent's employees are engaged exclusively in the operation and maintenance of the buildings in which the World Bank is located. These housekeeping duties performed by the Respondent's employees have no connection with the functions of the World Bank as an investment institution. They are, in fact, less intimately connected with the operations of the Bank than the maintenance activities of the contractor in the *Bay Ran* case, *supra*, in which the Board asserted jurisdiction over the maintenance contractor performing services for an exempted hospital. We are therefore constrained to adhere to our initial decision that it would effectuate the purposes of the Act to assert jurisdiction over the maintenance activities of the Respondent in the buildings occupied by the World Bank.

Accordingly, upon reconsideration, we affirm our Decision as published in 162 NLRB No. 83.

Dated, Washington, D. C.

Frank W. McCulloch, Chairman

John H. Fanning, Member

Gerald A. Brown, Member

Sam Zagoria, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE PETITIONER

United States Court of Appeals

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BRIEF FOR THE PETITIONER, HERBERT HARVEY, INC.

ISSUE PRESENTED

Whether the National Labor Relations Board properly asserted jurisdiction over the petitioner, Herbert Harvey, Inc.

Note: This case was previously before this Court (Senior Circuit Judge Miller, and Circuit Judges Danaher and McGowan) in No. 20,780, *Herbert Harvey, Inc., Petitioner* v. *National Labor Relations Board, Respondent*, decided October 26, 1967.

STATEMENT OF THE CASE

This case is before the Court upon the petition of Herbert Harvey, Inc., herein called "Harvey," for review of a Supplemental Decision (Supp. A. 1-9)[1] of the National Labor Relations Board, herein called "the Board," affirming a previously issued Board order against Harvey. The Board's Supplemental Decision was issued on May 8, 1968, and is reported at 171 NLRB No. 36. The Board's order, which the Supplemental Decision affirmed, is reported at 162 NLRB No. 83 (J.A. 127-135). This Court has jurisdiction of this proceeding under Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), herein called "the Act," the unfair labor practice found by the Board having occurred in the District of Columbia. The relevant provisions of the Act are set forth in the Appendix hereto, *infra*, pages 31-35.

Petitioner, Herbert Harvey, Inc., is a Delaware corporation with its main office located in the District of Columbia, where it is engaged in the management and operation of office and apartment buildings and general real estate. Pursuant to a contract with the International Bank for Reconstruction and Develop-

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[1] References designated "Supp. A." are to the Supplemental Appendix filed with the Court in this case; references designated "J.A." are to the Joint Appendix filed with the Court in *Herbert Harvey, Inc., Petitioner* v. *National Labor Relations Board, Respondent* (No. 20,780, this Court, —— App. D.C. ——, 385 F.2d 684 (1967)).

The Court's prehearing order herein directs that the Joint Appendix in No. 20,780 shall be treated as the parties' appendix in this case and that a supplemental appendix thereto shall be filed with the Court.

ment, hereinafter called "the World Bank" or "the Bank," Harvey provides operating and maintenance services at a complex of buildings located in the District of Columbia which are owned by the World Bank and where the Bank maintains its headquarters (J.A. 9, 70-88, 129-130).

In a representation proceeding conducted in 1966, the Board, naming Harvey as "an employer" of the employees involved, certified Government Service Employees' Union, Local 536, Building Service Employees' International Union, AFL-CIO, hereinafter called "the Union," as the collective bargaining representative of a unit of service and maintenance employees working at the Bank's complex of buildings (J.A. 89-100, 102).

In order to test the certification and the Board's underlying rulings, particularly the Board's assertion of jurisdiction, Harvey declined to bargain with the Union (J.A. 113). The Board's General Counsel then issued an unfair labor practice complaint alleging that Harvey, in violation of Sections 8(a)(5) and 8(a)(1) of the Act, had unlawfully refused to bargain with the Union (J.A. 101-104). Upon the General Counsel's motion for summary judgment and Harvey's response thereto (J.A. 111-126), the Board, on January 12, 1967, issued a decision and order in which it found Harvey guilty of the violation alleged in the complaint, and ordered Harvey, *inter alia*, to bargain with the Union (J.A. 127-135).

On February 21, 1967, Harvey petitioned this Court in Case No. 20,780 to review and set aside the Board's decision and order. On October 26, 1967, the Court issued its opinion (—— App. D.C. ——, 385 F.2d 684) in which the Court (Judges Miller and

Danaher, with Judge McGowan concurring) held that the Board had erred in failing to find that Harvey and the Bank were joint employers; in failing to decide whether the Bank was exempt from the Board's jurisdiction; and in failing to decide, if the Bank is in fact exempt, whether the Bank's status required the Board to refuse to assert jurisdiction over Harvey. Noting that the Board's assertion of jurisdiction over Harvey was inconsistent with Board decisions in other cases—cases that the Court said "appear to be indistinguishable"—and that the inconsistency was "totally unexplained," the Court remanded the case to the Board for further consideration in the light of its opinion.[2]

The Board's Supplemental Decision was issued pursuant to the Court's remand. Therein, the Board affirmed its original decision, and thereby again ordered Harvey to bargain with the Union.

I. The Facts

A. *The World Bank*

The World Bank is an intergovernmental institution established by Articles of Agreement which were drafted at the Bretton Woods Conference in July 1944 and which were formally accepted by a majority of the participating governments on December 27, 1945. The Bank is owned and controlled by more than 100 member nations which own all the Bank's capital

[2] In his concurring opinion, Judge McGowan referred to the Board's nonassertion of jurisdiction over employers providing services to institutions treated by the Board as exempt from its jurisdiction, and questioned whether Harvey had not been "treated differently to a degree that approaches the arbitrary" should the Board declare the Bank to be exempt.

stock. The United States is a participating member, and is the Bank's largest shareholder. The Bank's purposes are, in part, to aid in the reconstruction and development of member countries and to promote the long-range balanced growth of international trade. The Bank makes and guarantees loans for the economic development of its member countries, and also provides technical assistance of various kinds (Empl. Exh. 2, pp. 1-33; Empl. Exh. 3, pp. 1-5, 7, 110-113; Supp. A. 3).[3]

The World Bank is a specialized agency within the meaning of Article 57 of the Charter of the United Nations. The relationships between the Bank and the United Nations are governed by an agreement approved by the Bank's Board of Governors in September 1947 and by the United Nations General Assembly in November 1947. The agreement between the Bank and the United Nations specifically recognizes that "by reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Bank is, and is required to function as, an independent international organization" (Empl. Exh. 3, pp. 8-9; Supp. A. 3).

To enable the Bank to carry out its international functions and responsibilities, the Articles of Agreement establishing the Bank contain provisions which

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[3] Employer's Exhibits 2 and 3, pamphlets entitled, respectively, "Articles of Agreement—International Bank for Reconstruction and Development" and "Policies and Operations of the World Bank, IFC, and IDA" were introduced in evidence in Board Case No. 5-RC-5436 (J.A. 38), and are included in the record herein. They have not been reproduced in either of the appendices, but copies have been supplied for the Court's use.

accord to the Bank, in the territories of each of its members, legal status and certain privileges and immunities, including, among others, immunity from taxation and from actions and suits brought by member nations or by persons acting for, or deriving claims from, member nations (Empl. Exh. 2, pp. 22-24; Empl. Exh. 3, pp. 11-12; Supp. A. 3).

B. *The Relationship Between Harvey and the Bank*

Harvey is under contract with the Bank to provide, as an "independent contractor," operating and maintenance services at the Bank complex (J.A. 12, 70-80). Pursuant to the contract's terms, Harvey makes all repairs to the buildings and the equipment therein requested by the Bank; furnishes elevator, cleaning, and other janitorial services; and provides and supervises the personnel necessary for the rendition of these services. Harvey receives a monthly advance of a fixed amount from the Bank to pay the costs of the services it renders and, in addition, a fixed fee for its services. The fixed monthly advances and Harvey's fee for services aggregate more than $100,000 per year. The Bank underwrites all the costs of Harvey's services (J.A. 9, 13-19, 71-73, 78-79, 82-86). Thus, from the monthly advances that Harvey receives, Harvey pays such costs as employee wages and fringe benefits, including sick pay, vacation pay, social security taxes, and hospitalization and workmen's compensation premiums. The advances are also used to pay for supplies and equipment utilized in the performance of Harvey's contractual obligations (J.A. 15, 34-35). All supply items and all equipment bought with the monies advanced by the Bank are purchased under the Bank's tax exemption certificate and become the Bank's property.

The Bank's consent is obtained by Harvey for all non-routine purchases of supplies and materials (J.A. 15-17). If Harvey's expenses are less than the amounts advanced by the Bank, the savings accrue to the Bank and there is no change in Harvey's fixed fee. Written approval must be obtained from the Bank before Harvey can incur expenses in excess of the fixed monthly advances, or before any items are purchased which increase the costs of Harvey's operations (J.A. 15, 43-44). Harvey has no capital investment whatever in the equipment and supplies used at the Bank complex (J.A. 15).

The contract between Harvey and the Bank may be terminated by either party upon three months' notice, but it is subject to immediate termination by the Bank if, for any reason, Harvey's performance is substantially impaired (J.A. 73, 80).[4]

C. *The Direction, Hiring, Firing, and Promotion of Employees at the Bank Complex; the Establishment of Their Wage Rates*

Two men, who are on Harvey's payroll, devote their full time to the supervision of the approximately 150 service and maintenance employees working at the World Bank complex. One, McLaughlin, is the daytime supervisor; the other, Fuller, the nighttime. McLaughlin is in frequent contact with the Bank's office manager, Donovan, and with the latter's assistant, Johnson. These contacts occur daily (J.A. 18-21, 40-41). Donovan and Johnson have authority to issue work orders to McLaughlin, and exercise such author-

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[4] A condensed, but in many respects identical, description of the relationship between Harvey and the Bank as is here set forth was included in the Court's opinion in No. 20,780. See 385 F.2d at 684.

ity extensively. In fact, McLaughlin "would receive more order[s] from Mr. Donovan's office . . . than he would from our [the Harvey] office." The orders concern such matters as the cleaning and supply of restrooms, the cleaning of building fixtures, and the moving of furniture (J.A. 20).

Johnson also has the authority to give orders directly to the service and maintenance employees. This authority is exercised frequently. Thus, Johnson "often orders porters to do certain things that they [the Bank] want done. It may be to have a carpenter who has just completed a partition in an office, and if there is a mess in there and he sees a porter, he has authority and he would immediately tell the porter to go and get that cleaned up." Johnson likewise has the authority to supervise the service and maintenance employees in the performance of their work (J.A. 20-21).

Harvey does the actual hiring of personnel for the service and maintenance force. It also screens job applicants. Applicants must satisfy certain hiring standards established by the Bank. No applicant is ever hired without prior specific Bank approval if Harvey has any doubt about the applicant's qualifications or ability to satisfy the Bank's standards. In addition, the Bank sometimes directs Harvey to hire certain individuals. In such cases, Harvey complies with the Bank's directive without screening or checking further on the qualifications of the individuals concerned. The Bank, and not Harvey, determines the number of persons to be employed on the service and maintenance force (J.A. 23-26).

Discharges recommended by Harvey's supervisors cannot be made without the Bank's specific authoriza-

tion; in contrast, discharges directed by the Bank are carried out straightaway and without check by Harvey (J.A. 26-27).

The Bank sets specific guidelines as to personnel policy which Harvey must follow. Starting wages paid the service and maintenance employees are subject to the Bank's approval. Any change in overall wage scales must also have Bank approval before becoming effective. The Bank likewise must approve merit and periodic individual wage increases which, if disapproved by the Bank, are not put into effect (J.A. 28-30, 32, 43-47). Similarly, without the Bank's prior approval, employees cannot be promoted and sick leave payments cannot be made (J.A. 31, 36-37).[5]

II. The Board Representation Proceeding

After a hearing held on a representation petition filed by the Union, the Board, on June 13, 1966, issued a Decision and Direction of Election (J.A. 89-93). Therein, the Board found that, with numerated exclusions, the service and maintenance employees at the World Bank complex constitute a unit appropriate for the purposes of collective bargaining (J.A. 92). The Board further found: (1) although conditions of employment at the Bank complex are subject to the Bank's review and approval, "a considerable area of effective control" over such conditions rests with Harvey;[6] (2) Harvey is "an employer" of the em-

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[5] In its opinion in No. 20,780, the Court set forth the facts concerning the direction, hiring, firing, and promotion of the employees at the Bank complex, as well as the establishment of their wage rates, substantially as they are here set forth. See 385 F.2d at 685.

[6] The court pointed out in its opinion in No. 20,780 that the Board did not describe or elaborate upon what it referred to as

ployees in the appropriate unit; (3) the Board has plenary jurisdiction within the District of Columbia; and (4) Harvey's maintenance and service activities at the World Bank complex are not so intimately connected with the Bank's purposes or operations as to warrant the withholding of the exercise of the Board's jurisdiction over Harvey's operations (J.A. 91-92). Accordingly, the Board directed that a representation election be held among the employees in the unit found appropriate (J.A. 92-93).

Harvey moved for reconsideration of the Board's Decision and Direction of Election (J.A. 94-99), but the Board denied the motion without explication (J.A. 100). The Board then conducted an election in which the Union received a majority of the valid votes. On August 15, 1966, the Board certified the Union as the bargaining representative of the employees in the unit found appropriate in the Board's Decision and Direction of Election (J.A. 131).

III. The Unfair Labor Practice Proceeding

As stated, Harvey refused to bargain with the Union in order to test the validity of the Union's certification. Harvey was then named as respondent in an unfair labor practice proceeding.

A. *The Board's Original Decision and Order*

The Board concluded in its original Decision that there existed no triable issue requiring a hearing. Accordingly, relying upon its action in the representation proceeding, the Board granted summary judg-

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Harvey's "considerable area of effective control" over conditions of employment at the Band complex. See 385 F.2d at 685, n. 1.

ment against Harvey, found that Harvey had unlawfully refused to bargain in violation of Sections 8(a)(5) and 8(a)(1) of the Act, and ordered Harvey to bargain with the Union upon request (J.A. 128-129, 131-134).

B. *The Board's Supplemental Decision*

In its Supplemental Decision, in which it affirmed its original Decision (Supp. A. 9), the Board: (1) found that under the controlling authorities the Bank was not subject to the Board's jurisdiction (Supp. A. 3-4); (2) accepted, as the law of the case, ~~the fact that~~ the Court's declaration that the Bank and Harvey were joint employers of the maintenance employees at the Bank complex (App. A. 4); (3) said that because the housekeeping functions performed by the employees involved had no connection with the functions of the Bank as an institution, the Board's position in this case accords with its decisions in *Crotty Brothers*, 146 NLRB 755; *The Prophet Company*, 150 NLRB 1559; and *The Horn & Hardart Company*, 154 NLRB 1368; and (4) overruled its unpublished decision in *Specialized Maintenance Services, Inc.*, Case No. 22-RM-222 (App. A. 6-9). Relying principally upon language in the contract between the Bank and Harvey establishing Harvey as an independent contractor, the Board concluded that Harvey exercised effective control over the working conditions of the employees and was capable of bargaining effectively regarding their terms and conditions of employment (App. A. 4-6, 9).

ARGUMENT

When this case was before the Court on the first occasion we pointed out that the Board had, for the

most part, ignored Harvey's contentions—particularly, its contentions that the Bank and Harvey were joint employers; that the bank was exempt from the Board's jurisdiction; and that the Board's assertion of jurisdiction over Harvey was inconsistent with controlling Board precedents. We said at that time that it appeared that the Board was seeking to do by indirection what it seemingly conceded it could not do directly—that is, to assert jurisdiction over the Bank and its employees. Now, in obedience to the Court's directive, the Board has finally addressed itself to Harvey's contentions and has supplied its answers. With respect to one such answer—that in fact the Bank is not subject to the Board's jurisdiction—Harvey, of course, has no quarrel. We assert, however, that the Board's other answers are legally insufficient to overcome the defects patent in the Board's original decision. Thus, it is quite apparent that the Board has not shown either that Harvey is capable of bargaining effectively with the Union, or that the Board's treatment of Harvey is not basically inconsistent with that accorded by the Board to others similarly situated.[7]

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[7] Because the Court said in its opinion in No. 20,780 that the Board erred in failing to find the Bank to be a joint employer with Harvey, the Court appears to have precluded further argument to the effect that the Bank and not Harvey is the employer of the employees involved. However, the Court's opinion may be read as leaving the latter issue unresolved, for the Court also said: "We express no opinion on Harvey's contention that the maintenance personnel are the Bank's employees because, whether so or not, the record clearly shows a basis for a finding that Harvey and the Bank are joint employers, and counsel for the Labor Board in oral argument admitted as much." 385 F.2d at 685. If this issue in fact remains open, Harvey affirms the alternative position

I. Contrary to the Board, Harvey Cannot Engage in Meaningful Collective Bargaining With the Union

The Board states in its Supplemental Opinion that Harvey is fully capable of bargaining effectively with the Union regarding wages and other conditions of employment of the maintenance employees at the Bank complex (Supp. A. 4). In support of this assertion, the Board relies principally upon provisions in the written agreement between Harvey and the Bank, particularly paragraph 9 thereof in which Harvey is designated as an independent contractor and which, according to the Board, shows that Harvey is to be regarded as the employer with "primary responsibility" for the maintenance personnel (Supp. A. 4-5).[8] This reliance, we submit, is misplaced.

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it took when the case was first before the Court—that is, that the Bank, and not Harvey, is *the* employer of the employees at the Bank complex within the meaning of Section 2(2) of the Act—and in support respectfully refers the Court to its argument at pages 21-25 of its brief in No. 20,780.

For authorities supporting the proposition that Harvey and the Bank are joint employers, see the following cases: *Boire* v. *Greyhound Corporation*, 376 U.S. 473, 481; *N.L.R.B.* v. *New Madrid Mfg. Co.*, 215 F.2d 908, 913 (8th Cir.); *N.L.R.B.* v. *Dayton Coal & Iron Corp.*, 208 F.2d 905, 909 (6th Cir.); *The Greyhound Corporation*, 153 NLRB 1488. Other cases supporting the proposition are cited and discussed at pp. 27-29 of Harvey's brief in No. 20,780.

[8] Paragraph 9 of the Harvey-Bank agreement states (J.A. 73):

> It is understood and agreed that the Company (1) will perform the services to be rendered by it hereunder as an independent contractor, (2) will be solely responsible for the conduct of its employees, agents and servants, (3) and will hold the Bank harmless from any liability, loss

As for paragraph 9 of the Harvey-Bank written agreement, whether or not its language alone can be taken to endow Harvey with "primary responsibility" for the maintenance employees at the Bank—and we earnestly say, moreover, that to so interpret the provision is to read into it something which is not there—is not a controlling matter. The inquiry must, of course, go beyond the contract language, for it is the parties' actual practice with respect to the establishment of the conditions of employment that delineates the real relationship between Harvey, the Bank, and the employees. The same reason minimizes the importance of the fact that Harvey is labeled in paragraph 9 as an independent contractor. See *Boire* v. *Greyhound Corporation*, 376 U.S. 473, 481; *N.L.R.B.* v. *The Greyhound Corporation*, 368 F.2d 778, 780-781 (5th Cir.); *The Greyhound Corporation*, 153 NLRB 1488, 1495. It also makes completely irrelevant the further fact—likewise stressed by the Board (Supp. A. 4-5)—that the agreement neither reserves to the Bank "rights" to exercise authority over the employees' conditions of employment, nor places a limitation on the wages that Harvey may pay to the employees.[9]

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or damage arising out of the conduct of the Company, its employees, agents and servants.

The Board supplied emphasis to the words "independent contractor" and "its employees" when it reproduced this provision in its Supplemental Decision (Supp. A. 4).

[9] Parenthetically, it is pertinent to observe that in its Supplemental Decision the Board failed to mention two provisions of the Harvey-Bank written agreement which enhance the Bank's status and lessen Harvey's. Thus, paragraph 1 of the agreement provides that the Bank may itself perform or otherwise procure the performance of the services to be rendered by Harvey (J.A. 71); and paragraph 11 gives to the

Equally unpersuasive is the Board's attempt (Supp. A. 5) to explain away the facts of the actual practice —facts which clearly show the authoritative role of the Bank with respect to the establishment of the employees' conditions of employment. Thus, according to the Board, Harvey's "acquiescence" in the Bank's intrusion was nothing more than an effort to please a client, and the Bank's establishment of wage rates was done only "to police its costs." To this, of course, the short answer is that even if the Board's appraisal of the parties' motives is accurate, itself a dubious assumption, the matter of their motives is entirely irrelevant to the issue of whether Harvey is in a position to bargain meaningfully with the Union. And it is clear that the Board has only touched that issue peripherally in its Supplemental Decision.[10]

Bank the privilege of terminating the agreement at any time if for any reason Harvey's performance is "substantially impaired" (J.A. 73).

[10] In support of its position, the Board cites *N.L.R.B.* v. *E. C. Atkins & Co.*, 331 U.S. 398, and its own decisions in *Great Southern Chemical Corporation*, 96 NLRB 1013, *American Smelting and Refining Company*, 92 NLRB 1451, and *Reynolds Corporation*, 74 NLRB 1622 (Supp. A. 6). The Board's reliance on these cases, which involve the relationship between employers and United States government agencies, is misplaced. *Most importantly, in none of them was a joint employer relationship found to exist between the employer and the exempt agency.* Additionally, each of the cases is further distinguishable factually.

Thus, in *Atkins* the issue was whether the Board could properly order an employer to bargain with respect to plant guards who had been enrolled as civilian auxiliaries to the military police. The applicable War Department regulations specifically recognized that "militarization of plant guard forces does not change the existing system of hiring, compensation, and dismissal; all remain primarily a matter between

Moreover, in the Court's language, in view of the Bank's "dominant role" (385 F.2d at 686) in the establishment of the maintenance employees' terms and conditions of employment, as well as the magnitude of the powers of control actually exercised by the Bank over the employees, we submit that the conclusion is inescapable that Harvey cannot engage in meaningful collective bargaining with the Union. As to the Bank's control, its work orders are not only

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the guards and plant management . . .," the Court noting that "[A]s to the employer's relations with the guard force, the regulations were explicit in recognizing that those relations remained essentially the same as if there were no militarization," and that "the normal, private employer-employee relationship was to remain substantially intact." 331 U.S. at 408, 411, 412.

In *American Smelting*, involving the relationship between a contractor and the Atomic Energy Commission, there were specific findings that only the contractor conducted negotiations with respect to the employees involved, and that the Commission had "advised the employer of its intention not to participate in any labor negotiations." 92 NLRB at 1452, note 1. In *Great Southern Chemical* the contractor had already recognized one union as the representative of its employees and had "thereby indicated that it will conduct negotiations at this plant." 96 NLRB at 1015. And in *Reynolds* the contractor was "solely responsible" for labor relations at the plant and was under no obligation to follow the Navy Department's suggestions or recommendations, and there was no requirement that the Department give its advance approval of wage scales. 74 NLRB at 1631-1632.

Neither *American Smelting* nor *Great Southern Chemical* was reviewed judicially. *Reynolds, reversed on other grounds*, 168 F.2d 887, was initially remanded to the Board for consideration of rejected evidence bearing on the relationship between the contractor and the Navy, the Court expressing doubt as to "whether the United States or the Corporation is the substantial employer." *N.L.R.B.* v. *Reynolds Corp.*, 155 F.2d 679, 681, 682 (5th Cir.).

passed through Harvey's supervisors to the employees, but they are often given directly to the employees themselves by Bank officials (J.A. 20-21). The Bank, and not Harvey, establishes the standards which applicants for employment must satisfy; it, and not Harvey, likewise determines the number of persons to be employed; and, although Harvey screens and does the hiring of employees, the Bank maintains, and actually exercises, a right to direct Harvey to hire any person it selects (J.A. 23-26). And the Bank has the power to direct employee discharges which, once directed, become effective automatically; Harvey, however, cannot effect the discharge of any employee without the Bank's approval (J.A. 26-27).

As to the Bank's preponderant power to establish terms and conditions of employment, it is the Bank that sets specific guidelines as to personnel policy which Harvey follows (J.A. 46-47). The Bank, and not Harvey, has the final say concerning beginning wage rates and overall wage scales, for without the Bank's approval Harvey cannot effect changes in these matters. Similarly, the Bank retains and exercises a veto power over merit and individual wage increases and the granting of sick leave. And without the Bank's approval, no promotion may be made (J.A. 28-32, 36-37, 43-45, 47).

The facts of the actual practice show plainly therefore the Bank's superior position with respect to the most vital areas of labor-management relations. "The most important incidents of the employer-employees relationship [are] wages, hours and promotion . . . ." *N.L.R.B.* v. *E. C. Atkins & Co.*, 331 U.S. 398, 413. The Bank's superior position is reinforced, moreover, through its actual control over disbursements made to and for the employees. Thus the Bank turns over to

Harvey "monthly advances"; and from such advances, Harvey pays the employees their wages and the costs of the employees' fringe benefits, including sick pay, vacation pay, social security taxes, and hospitalization and workmen's compensation premiums (J.A. 15, 34-35).

In these circumstances it cannot be maintained plausibly that collective bargaining between Harvey and the Union could be anything more than a meaningless tableau. How could Harvey, for example, accede to a Union request for a general wage increase if the Bank should take an adamant position against such an increase? How could Harvey and the Union reach agreement regarding such fundamental subjects of collective bargaining as union security, grievance procedures, vacations, holidays, promotions, and seniority unless Harvey first consulted with the Bank and the Bank in turn signified its assent? In short, the actual circumstances, unrefuted by the Board in any way, clearly support the Court's initial appraisal that "the Board's order that Harvey bargain with the union as to wages and conditions of employment would result in futility: any agreement made by Harvey as a result of negotiations would be subject to veto by the World Bank, which has not been ordered to bargain with the union" (385 F.2d at 686).

Controlling authorities show that in view of its futility the Board's bargaining order against Harvey should not be enforced. Thus, upon rehearing in *Westinghouse Electric Corporation* v. *N.L.R.B.*, 387 F.2d 542 (1967), the Fourth Circuit sitting en banc stated its disapproval of a Board order requiring futile collective bargaining.[11] There, the Board had

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[11] In support of its position in opposition to Harvey's "futility" argument, at page 14 of the brief it filed in this

ordered Westinghouse to bargain with a union representing its employees concerning the prices charged for coffee in plant cafeterias which were operated by an independent contractor. Refusing to enforce the Board's order, the Court said (387 F.2d at 550):

> The Board would order Westinghouse to bargain with [the union] about prices charged by the independent caterer with full knowledge that Westinghouse cannot make an enforceable contract to change those prices since it does not set them. This court long since decided that the purpose of collective bargaining is to produce an agreement and not merely to engage in talk for the sake of going through the motions . . . . The Board calls upon Westinghouse to engage in the very form of fictional bargaining condemned in the *Highland Park* case [*N.L.R.B.* v. *Highland Park Mfg. Co.*, 110 F.2d 632 (4th Cir.)].

Similarly, in *N.L.R.B.* v. *Winn-Dixie Stores, Inc.*, 361 F.2d 512 (1966), the Fifth Circuit refused to enforce a portion of a Board bargaining order requiring a company to bargain about the re-establishment of an operation in view of the fact that the company would undoubtedly have refused to bring about such re-establishment, the Court saying (361 F.2d at 517): ". . . to bargain with respect to such re-establishment would be a mere 'exercise in futility'." And in *N.L.R.B.* v. *Grace Co.*, 184 F.2d 126, 130-131, 189 F.2d 258, the Eighth Circuit refused to enforce a bargaining order where a plant had been permanently

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Court in No. 20,780, the Board cited the original three-judge panel decision in the *Westinghouse* case, reported at 369 F.2d 891. The latter decision was overruled upon rehearing (387 F.2d at 550), with only two of the six participating judges adhering to the original result.

closed, the Court saying (184 F.2d at 130): "Nor could this court punish for contempt the respondent's failure *to do the impossible*—to bargain collectively with a bargaining representative which represents no employees because there are none and can be none in a permanently closed plant" [emphasis supplied]. See also *N.L.R.B.* v. *Alamo White Truck Service, Inc.*, 273 F.2d 238, 242 (5th Cir.); *N.L.R.B.* v. *Reynolds Corp.*, 155 F.2d 679, 681, 168 F.2d 877 (5th Cir.). *Accord: N.L.R.B.* v. *Florida Citrus Canners Cooperative*, 288 F.2d 630, 632 (5th Cir.), *reversed on issue concerning standard of judicial review*, 369 U.S. 404 ("The doing of a useless and futile thing is no more required in collective bargaining between an employer and a labor union than in other activities"). *Cf. N.L.R.B.* v. *Sommerset Classics, Inc.*, 193 F.2d 613, 616 (2nd Cir.); *N.L.R.B.* v. *Dixon*, 184 F.2d 521, 522 (8th Cir.).

In sum, because of the Bank's paramount position with respect to the establishment of the employees' terms and conditions of employment, and in view of its exemption from the Board's jurisdiction, the Board's order requires Harvey to engage in "fictional bargaining" and should therefore be condemned.

II. The Board's Assertion of Jurisdiction Over Harvey Is Arbitrary and an Abuse of the Board's Discretion Because Such Assertion Is Inconsistent With Controlling Board Precedents Which the Board Has Not Distinguished Meaningfully

In response to the Court's Directive, and in support of its assertion of jurisdiction over Harvey, the Board has supplied an explanation in its Supplemental Decision—an explanation which was apparently deliberately avoided in the Board's original Decision—by

which it purports to distinguish Board decisions which are plainly inconsistent with that being reviewed by the Court. These decisions—*Crotty Brothers, N.Y., Inc.*, 146 NLRB 755 (1964); *The Prophet Co.*, 150 NLRB 1559 (1965); and *The Horn & Hardart Company*, 154 NLRB 1368 (1965)—clearly establish the principle that the Board will not, under the authority conferred by Section 14(c)(1) of the Act, assert jurisdiction over an employer performing noncommercial service operations "intimately connected" with the activities of an institution over which the Board would not, or could not, assert jurisdiction.

In *Crotty*, a union sought to represent food service employees employed by Crotty, a food service management concern, at eating facilities located at Trinity College, a nonprofit educational institution exempt from the Board's jurisdiction.[12] Crotty provided food service to Trinity's students, faculty members, and administrators. Trinity reimbursed Crotty for all operating expenses, such as wages, liability insurance, and workmen's compensation. Crotty was paid on a cost-plus-fixed-fee basis, within the limits of a budget approved by Trinity. Crotty invested no capital and had no control over any matter which would permit it to profit from the food service operation. Trinity purchased all nonexpendable items; Crotty purchased expendable items in the name of "Crotty Brothers-Trinity College." Crotty's manager at Trinity was subject to the control and direction of Trin-

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[12] The Board has, as a matter of discretion, elected not to assert jurisdiction over nonprofit educational institutions. See *Trustees of Columbia University*, 97 NLRB 424 (1951). See also *Young Men's Christian Association of Portland, Oregon*, 146 NLRB 20 (1964).

ity's Food Service Director. Within budget limits, Crotty was permitted to hire, discharge, and set wage rates. In these circumstances, the Board declined to assert jurisdiction, finding that "the food service operations here involved are noncommercial in nature and intimately connected with Trinity's nonprofit educational purposes. . ." (146 NLRB 757).

In *Prophet*, the Board, citing *Crotty*, again declined to assert jurisdiction over an employer operating food service facilities at Whitewater State University, also a nonprofit educational institution. The employer in *Prophet* received the largest share of its income from a fixed fee paid by the university, and owned none of the fixed equipment or nonperishable goods used in the university's dining facilities; the university, moreover, retained "certain supervisory control" over the employer's operations, including the right to reject nonacceptable employees (150 NLRB at 1560). In *Horn & Hardart*, the *Crotty* doctrine was also the basis for the nonassertion of jurisdiction over a food service operation at a hospital which was itself exempt from the Board's jurisdiction under Section 2 (2) of the Act. In the performance of their duties the employees involved in *Horn & Hardart* were subject to direction by the hospital's supervisory staff and were required to comply with hospital regulations (154 NLRB at 1370).

The explanation set forth in the Board's Supplemental Decision concerning its inconsistent *Crotty*, *Prophet*, and *Horn & Hardart* decisions, is most unpersuasive. Thus, the Board states that the food service operations in the latter cases were "intimately connected" with the educational, patient care, and medical purposes of the exempt universities and the

hospital; but that the housekeeping duties performed by the employees at the Bank complex are "less intimately connected" with the Bank's functions as an investment institution (Supp. A. 6, 7, 8, 9). Obviously, the distinction the Board draws is superficial at best. Significantly, although the Board has repeatedly used and relied upon the vague phrase "intimately connected" as the rationale for its jurisdictional actions, neither in its Supplemental Decision herein nor in the three cases the latter Decision purportedly distinguishes has the Board ever defined that phrase or otherwise endowed it with substance or meaning. Thus, the phrase merely connotes an ultimate Board conclusion unsatisfactorily explained: where jurisdiction is not asserted, activities are labeled by the Board as "intimately connected" with an exempted entity; if, however, jurisdiction is asserted, the "intimate" connection vanishes.

Clearly, it is incumbent upon the Board to provide analysis that is more perceptive and discriminating. Had the Board essayed such analysis in this case, the Board's own conclusion may well have been different. Thus, in the *Crotty* line of cases, the Board seems to have said that students at a university and patients in a hospital must be supplied with food if the university is to have students who come to learn, and if the hospital is to have patients who come to be cured. Stating the matter somewhat differently, the Board appears to have said that neither the university nor the hospital could function properly or achieve the purposes for which they were created and exist unless certain prerequisites are met—including the feeding of students who are in attendance and the patients who have been admitted. These propositions, though not articulated by the Board, are obviously sound.

But similar formulations applied to the facts of this case necessarily dictate a result contrary to the Board's conclusion. For the Bank, too, cannot function properly or achieve the purposes for which it was intended unless certain prerequisites are likewise met—including, here most relevantly, the existence of a headquarters building containing appropriate and adequately maintained offices and facilities for use by its chief officers, its staff, and visitors to the Bank.

Thus viewed, the fallacy of the distinction drawn by the Board in its Supplemental Decision is plainly evident. The maintenance of the Bank's complex of buildings, as well as the so-called "housekeeping duties" (Supp. A. 9) there performed by the employees involved, are essential if the Bank is to be a viable institution. As the Board recognized (Supp. A. 8), the Bank is an international investment institution engaged in making or guaranteeing loans for productive reconstruction and development projects in the territories of its member countries. These functions —as well as the supporting study, research, analysis, deliberation, and discussion so vitally connected with the functions—cannot be carried on unless the personnel involved in the Bank's operations are provided with an appropriate location, atmosphere, and surroundings. To be specific, it is quite clear that the Bank, whose offices are in high-rise buildings, cannot function properly without elevator service for its employees and visitors. Nor can it function properly if appliances and equipment that supply light, air conditioning, and heating are not in working order. And certainly, clean and adequately supplied offices and restroom facilities are just as essential to the Bank's purpose and proper functioning as is the feeding of students and patients to a university's or a hospital's.

When the Board in March 1966 issued its unpublished decision in *Specialized Maintenance Services, Inc.*, Case No. 22-RM-222 (J.A. 121-126), the Board clearly recognized that no meaningful or logical distinction may be made for jurisdictional purposes between the rendition of building maintenance services to an exempt institution and the rendition of food services to institutions likewise exempt. Thus, in refusing to assert jurisdiction over the building maintenance supplier in *Specialized Maintenance*, the Board held that the supplier's service was "intimately connected with the nonprofit educational purposes" of the university involved, and the Board specifically cited in support of the ruling its decisions in *Crotty* and *Prophet* (J.A. 121). Now, obviously because the Court pointed out the "inconsistency" (385 F.2d at 686) between *Specialized Maintenance* and the Board's treatment of Harvey in this case, the Board has "overruled" *Specialized Maintenance* (Supp. A. 8).[13] But this belated action in no way devitalizes the

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[13] Although *Specialized Maintenance* has now been overruled, the Board's decision in *Bay Ran Maintenance Corporation*, 161 NLRB 820, to which the Board refers in its Supplemental Decision (Supp. A. 8, 9), still has vitality. In *Bay Ran*, the Board asserted jurisdiction over an employer rendering cleaning services to a hospital. Noting that the employer's crews did general cleaning of the hospital's rooms, wards, and other hospital facilities but did not clean or handle such items as bedpans, pitchers, sheets, and other laundry, and noting further that the employer had complete control over the crews' day-to-day performance and working conditions, the Board found that the "maintenance and service activities of the employer at the hospital are not so intimately interrelated with the operations or purposes of the hospital as to warrant withholding our exercise of statutory jurisdiction." 161 NLRB at 822. *Accord: Richmond of New Jersey,*

basic soundness of the Board's decision in *Specialized Maintenance*. For it is clear that the only measure achieved by the Board's overruling of *Specialized Maintenance* is the elimination—retroactively, to be sure—of a Board decision that is irreconcilable with the one before the Court. Despite the belated suppression of *Specialized Maintenance*, the logic of that case still has force and is here controlling, just as the Board's still extant decisions in *Crotty*, *Prophet*, and *Horn & Hardart*—decisions aptly characterized by this Court as "indistinguishable" (385 F.2d at 686)—are themselves, as we have shown, likewise controlling.

Another case, *Hotel & Restaurant Employees Local 343 (Resort Concessions, Inc.)*, 148 NLRB 208 (1964), highlights the illogic of the Board's present position with respect to Harvey. Since 1950, the Board has, as a matter of policy and in the exercise of its discretion, consistently declined to assert jurisdiction over racetracks. *Los Angeles Turf Club, Inc.*, 90 NLRB 20 (1950); *Hialeah Race Course, Inc.*, 125 NLRB 388 (1959); *Jefferson Downs, Inc.*, 125 NLRB 386 (1959). The Board's policy was adopted because racetrack operations are essentially local in character and are subject to regulation by the states. See

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Inc., 168 NLRB No. 117, 67 LRRM 1113. But *cf. Inter-County Blood Banks, Inc.*, 165 NLRB No. 38, 65 LRRM 1302, and 63 LRRM 1404, where the Board declined to assert jurisdiction over an employer providing blood bank services to both exempt (nonprofit) and nonexempt hospitals, neither of which exercised direct control over the employer's operations or employees.

Both *Bay Ran*, which is clearly inconsistent with the overruled *Specialized Maintenance* case, and *Inter-County Blood Banks* serve to emphasize the fine line the Board seeks to draw with respect to the *Crotty* line of cases.

Hialeah Race Course, Inc., 125 NLRB at 390-391. The policy of declination has been extended to owners, breeders, and trainers of race horses, see *Meadow Stud, Inc.*, 130 NLRB 1202 (1961); *William H. Dixon*, 130 NLRB 1204 (1961); *Walter A. Kelley*, 139 NLRB 744 (1962), and to a division of Pinkerton employees employed as guards on the premises of a harness track, see *Pinkerton's National Detective Agency, Inc.*, 114 NLRB 1363 (1955).

In *Resort Concessions*, a case to which the Board has not referred in its decisions herein, the Board applied its racetrack policy and declined to assert jurisdiction over a food and beverage concessionaire at a harness racing track. The bulk of the concessionaire's revenue was derived from its operation of a cafeteria, a restaurant, and a number of stands and bars where it sold food, alcoholic liquor, tobacco, and candy to the general public (148 NLRB at 209-210). Significantly, the Trial Examiner, whose decision in *Resort Concessions* was adopted without comment by the Board, recognized that the services provided by the concessionaire were "not absolutely necessary to the functioning of the racetrack" (148 NLRB at 214). Nevertheless, the Examiner thus stated the primary reason for nonassertion (148 NLRB at 214):

> [the concessionaire's services] are an integral attribute of a facility such as a racetrack devoted, in the final analysis, to the entertainment and diversion of its patrons, and are, accordingly, a feature expected and demanded by the track's patrons. Accordingly, I am convinced that Raceway is dependent upon the restaurant and concession facilities of Resort not only for revenue but to fulfill the demands of its patrons and track personnel, and that, as a consequence, there exists

an extensive interrelationship between the operations of Resort and those of Raceway.

Resort Concessions, therefore, further demonstrates that the Board is following an inconsistent jurisdictional policy with respect to persons providing services to those exempt from the Board's jurisdiction. For, using the Board's own vague standard, how can it be maintained that the concessionaire's services in *Resort Concessions* are "intimately connected" with a racetrack operation, whereas Harvey's services are not so connected with the Bank's operations? In short, what the Board is actually saying is that a racetrack could not function properly without the availability of food and liquor for the racetrack's patrons, whereas the Bank could continue to function properly even if it is deprived of elevator service, electric lights, and clean restrooms. Thus phrased, the Board's position borders on the absurd.

Plainly, therefore, the Board's assertion of jurisdiction over Harvey is inconsistent with other Board jurisdictional actions. The assertion accordingly stands as an arbitrary and capricious exercise of power which, under controlling authority, should be set aside. The Board, to be sure, has discretion in the area of jurisdiction, but the discretion is not unlimited. Where the Board's exercise of jurisdictional discretion is arbitrary, the action must be set aside. See *Office Employees Local No. 11* v. *National Labor Relations Board*, 353 U.S. 313, 318-320; *Hotel Employees Local 255* v. *Leedom*, 358 U.S. 99. Moreover, 5 U.S.C. Sec. 706, 80 Stat. 303 (derived from Section 10 (c) of the *Administrative Procedure Act*) provides in part that a reviewing court shall hold unlawful and set aside agency action that is ". . . arbitrary, ca-

pricious, an abuse of discretion, or otherwise not in accordance with law." Additionally, in *Burinskas* v. *N.L.R.B.*, 123 App. D.C. 143, 148, 357 F.2d 822, 827 (1966), a case involving a question of tolling back pay, this Court noted that the Board had acted differently "in cases very similar to the one at hand," and said:

> . . . The Board cannot act arbitrarily nor can it treat similar situations in dissimilar ways. The Board has a responsibility to administer the Act fairly and rationally.

The Ninth Circuit expressed a similar view in *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 366 F.2d 126, 129, *judgment vacated on other grounds*, 389 U.S. 375: "We find it difficult to approve the Board's cavalier use of precedent when it desires to follow it, and the disregard of it when it wishes to achieve a different result." *Accord*, that error is committed when an agency's action is arbitrary and capricious: *N.L.R.B.* v. *International Brotherhood of Teamsters*, 225 F.2d 343, 347-348 (8th Cir.); *N.L.R.B.* v. *Mall Tool Co.*, 119 F.2d 700, 702 (7th Cir.); *N.L.R.B.* v. *Metal Mouldings Corp.*, 12 LRRM 723, 724 (6th Cir.). See also *Melody Music, Inc.* v. *Federal Communications Commission*, 120 App. D.C. 241, 243-244, 345 F.2d 730 (1965).

CONCLUSION

For the foregoing reasons, Harvey respectfully urges the Court to reverse the Board's order and to dismiss the unfair labor practice complaint against Harvey.

Respectfully submitted,

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), are as follows:

* * * *

DEFINITIONS

SEC. 2. When used in this Act—

* * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9.(a) Representatives designated or selected for the purposes of collective bargaining

by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

* * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10.(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment

or prevention that has been or may be established by agreement, law, or otherwise . . . .

* * * *

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . .

* * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant

to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *

LIMITATIONS

* * * *

SEC. 14.(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

* * * *

No. 22,040

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

HERBERT HARVEY, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION FOR REVIEW AND ON CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF ISSUE PRESENTED

The parties have stipulated that the sole issue in this case is whether the Board properly asserted jurisdiction over petitioner.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon petition of Herbert Harvey, Inc. ("Harvey") pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*) to

review a Supplemental Decision of the National Labor Relations Board, issued on May 8, 1968 and the Board's initial Decision and Order, issued on January 12, 1967, and reported at 162 NLRB No. 83 (J.A. 127-135).[1] The Board has filed a cross-application for enforcement. This Court issued an opinion on October 26, 1967, remanding the Board's initial decision and order for further consideration. 128 App. D.C. 162, 385 F.2d 684. The Board's Supplemental Decision pursuant to remand is reported at 171 NLRB No. 36 (Supp. A.).[2]

I. THE BOARD'S FINDINGS OF FACT

The facts of this case are essentially undisputed. The Board accordingly adopts Harvey's Statement of Facts with the following additions and modifications.

The contract between Harvey and the Bank contains the following provisions, *inter alia* (Supp. A. 4; J.A. 71-73, 82):

> 1. The Company shall:
>
> (i) furnish to the Bank complete operating service. . . .
>
> * * *
>
> 2. The foregoing services shall be rendered by the Company in an efficient, safe and business-like manner, and, to the extent consistent therewith, as economically as sound business judgment warrants.
>
> * * *
>
> 9. It is understood and agreed that the Company (1) will perform the services to be rendered by it hereunder as

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[1] "J.A." refers to the portion of the record printed as a joint record appendix to the briefs in the initial proceeding before this Court. References preceding the semicolon are to the Board's findings; those following are to supporting evidence.

[2] "Supp. A." refers to the portion of the record printed as a supplemental record appendix.

> an independent contractor, (2) will be solely responsible for the conduct of its employees, agents and servants, (3) and will hold the Bank harmless from any liability, loss or damage arising out of the conduct of the Company, its employees, agents and servants.

Applications for employment are made on forms provided by Harvey (J.A. 91; 41). Harvey's own supervisory personnel interview job applicants, check their references, and hire them if qualified and needed, subject to the Bank's right to reject any applicant with a police record (J.A. 91; 23, 41).

Although Bank officials on occasion instruct an employee to clean up a "mess" which they discover, specific work requests are normally channeled through Harvey's supervisors, McLaughlin and Fuller (J.A. 91; 20-21). Those supervisors perform the routine direction of the work force, assigning normal tasks, recommending disciplinary action, and passing upon requests for sick leave and vacation (J.A. 18-21, 27, 36, 47-49). Also, unsatisfactory job performance is generally brought to the attention of Harvey, and Harvey is responsible for seeing that the work is done satisfactorily (J.A. 41-42, 50).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board, in its Supplemental Decision, found that the World Bank is not subject to Board jurisdiction; and accepted, as the law of the case, this Court's holding that Harvey and the World Bank are joint employers of the employees involved. Nonetheless, the Board concluded, "it would effectuate the purposes of the Act to assert jurisdiction" here. Thus, the Board found that Harvey's operations are not so intimately connected with the purposes and operations of the World Bank as to require the Board—consistent with its own precedents—to refrain from asserting jurisdiction

over Harvey (Supp. A. 8-9). In addition, the Board found that Harvey exercises effective control over the working conditions of its employees and is fully competent to bargain with the Union in accordance with the provisions of the Act (Supp. A. 4-6). Accordingly, the Board reaffirmed its original decision, in which it found that Harvey violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, the duly certified representative of its employees, upon request (J.A. 127-133). The Board's order requires Harvey to bargain with the Union upon request and to post an appropriate notice (J.A. 135-136).

ARGUMENT

A. Introduction

There is no question in this proceeding that under Sections 10(a) and 2(6) and (7) of the Act, the Board possesses statutory jurisdiction over Harvey, and Harvey does not contend otherwise. However, under Section 14(c)(1) of the Act, the Board may, "in its discretion . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." Pursuant to this provision, the Board has established a policy of refusing to assert jurisdiction over an employer performing noncommercial service operations which are "intimately connected" with the activities of an institution exempt from the Board's jurisdiction. Harvey maintains that, in order to be consistent with this practice, the Board should have refrained from asserting jurisdiction over Harvey on the same grounds. Alternatively, Harvey urges that it does not exercise effective control over the working conditions of the employees concerned, and therefore that the Board should not have ordered it to bargain with their

selected representative. As we now show, the Board could reasonably reject both contentions.

B. The Board did not disregard its own precedent in asserting jurisdiction over Harvey

The initial question posed by this proceeding is whether the Board should have refrained from asserting jurisdiction over Harvey because of the nature of the relationship between Harvey and the World Bank. This Court found that Harvey and the Bank are joint employers of the maintenance employees whom the Union seeks to represent. The World Bank, however, as an international institution which enjoys special privileges and immunities, is not subject to the Board's jurisdiction (Supp. A. 3-4). There is no authority for the proposition that if one employer in a joint employer relationship is exempt from the Board's jurisdiction, the other employer must also be exempt as a matter of law. And Harvey does not seek such a ruling. But the Board does exempt an employer providing services for an exempt institution where those services are intimately connected with the purposes and activities of the exempt institution. Harvey's contention is that the instant case is indistinguishable from those in which the Board, relying upon the above principle, has decided not to assert its jurisdiction, and therefore that the Board should have refrained from asserting jurisdiction in this case also.

A review of the cases involving the policy in question dictates otherwise. The policy was clearly illustrated in *Crotty Brothers, Inc.*, 146 NLRB 755 (1964). In that case, Crotty Brothers, Inc., an independent contractor engaged in the business of furnishing food service management to hospital, educational and business establishments, had entered into a contract with Trinity College, a non-profit educational institution, under

which Crotty would provide Trinity with food service on a cost-plus-fixed-fee basis. The record revealed that prior to the 1951 contract, Trinity had provided its own food service; that the food service operation was paid for out of Trinity's college operations budget, and included a full-time dining hall for resident students and faculty; that Trinity exercised considerable control over the budget, labor relations, and all problems which might arise; and that Crotty had no capital investment in or opportunity to profit from the operations. The Board found on the basis of these facts that Crotty's operations were non-commercial in nature, and intimately related to Trinity's educational purposes. Trinity itself was exempt from the Board's jurisdiction under the Board's well-established policy of refusing to assert jurisdiction over non-profit educational institutions.[3] In view of the intimate relationship between the food services of Crotty and the operations of the college in furtherance of its educational purposes, the Board determined that it would not effectuate the policies of the Act to assert jurisdiction over Crotty.

Similar circumstances were present in *The Prophet Co.*, 150 NLRB 1559 (1965), wherein the contractor involved provided food services to Whitewater State University, a non-profit educational institution. The University paid the contractor a fixed fee for every student enrolled in the board plan, in addition to the percentage which the contractor received from any cash sales which it made. The contract also provided that the contractor would abide by all rules and regulations of the University, that it would submit menus to the University for approval at least one week in advance, that it would use student help at the campus wage rate scale,

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[3]See, e.g., *Trustees of Columbia University*, 97 NLRB 424, 427 (1951). See also, *Office Employees International Union v. N.L.R.B.*, 353 U.S. 313, 318 (1957).

that it would assign to duty only employees acceptable to the University, and that it would keep its service open and maintain adequate service at such hours as the parties mutually agreed upon. Relying upon the principle enunciated in *Crotty*, the Board again decided that it should not assert jurisdiction over the contractor, because the services which it performed were "intimately tied to the educational purposes of the nonprofit college." (150 NLRB at 1560).

And in *Horn & Hardart Co.*, 154 NLRB 1368 (1965), the Board refused to assert jurisdiction over a food service operation under contract with a voluntary non-profit hospital exempt from the coverage of the Act, noting that the preparation and nutritive contents of the food to be served to patients were subject to approval by the Hospital, that all menus for patients were prepared by the hospital's chief dietician, who also decided the times at which such food would be served, that the cafeteria was maintained for the exclusive use of hospital employees, that the coffee shop was maintained for hospital visitors only, that the employees in the performance of their duties were subject to direction by the hospital supervisory staff, and that all employees were required to comply with the hospital's clothing and sanitation requirements.

Three other cases illustrate the application of the principle that jurisdiction will not be asserted over employers whose activities are intimately connected with those of an exempt institution. In *Massachusetts Institute of Technology*, 152 NLRB 598 (1965), the Board determined that it should not exercise jurisdiction over a Computation Center operated at the University as a joint undertaking by M.I.T. and International Business Machines, Inc. ("IBM"). The Board noted in that case that although the center was supported in large measure by IBM, the employees performed

no activity directly for the benefit of either IBM or any other commercial firm; that instead, the purpose of the Center was to provide the University with a facility for education, research and problem solution, that all of its uses were closely linked with the University, that it was utilized primarily for research by faculty members and students of M.I.T. and other participating universities, and that the results of the research contributed directly to the educational function of those institutions. Similar considerations governed the Board's decision to refrain from asserting jurisdiction in *University of Miami, Institute of Marine Science Division*, 146 NLRB 1448 (1964). And in *Hotel & Restaurant Employees Local 343 (Resort Concessions)*, 148 NLRB 208, 214 (1964), the Board refused to assert jurisdiction over a food and beverage concession located at an exempt race track because the services of the concession were found to be an "integral attribute of a facility such as a race track devoted . . . to the entertainment and diversion of its patrons."

In contending that the decisions in the foregoing cases compel nonassertion of jurisdiction in this case also, Harvey misconstrues the purport of the policy involved (Pet. Br. 28). The Board did not, contrary to Harvey's analysis, refuse to assert jurisdiction in those cases because the employer's services were necessary to the viable functioning of the exempt institution. Instead, it refused to assert jurisdiction because those services were intimately connected or related to the institution's exempted operations. The controlling factors are thus not the necessity of the services to the exempt institution, but the nature of the services performed and the

extent to which those services are interwoven with, and inseparable from, the characteristic activities of that institution.[4]

For example, in *Horn & Hardart*, it is evident that the food service operations of a hospital is inextricably intertwined with the hospital's overall function of caring for and curing patients: special diets are necessary for many of the patients, meals must be served at certain specified times, appropriate facilities must be provided for the staff which will be available at all times, and separate facilities must be maintained for visitors, which will be open at special hours. Similarly, in *Crotty* and *The Prophet*, the food service operations maintained at the universities involved were not only essential to, but completely interrelated with, the functioning and purposes of those universities. The hours at which such facilities will be open must be coordinated with class and vacation schedules; the employment of students in such facilities is governed by college policies regarding maximum wages, number of hours which students are permitted to work, and overall working scholarship programs; and the content of the meals itself is often governed by college policies regarding religious and other holidays, special events, and other considerations. In *M.I.T.* and *University of Miami*, the computer centers were found to be utilized as an integral part of the educational process; and in *Resort Concessions*, the

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[4]Petitioner, having inaccurately formulated the Board's doctrine, now finds that it fails to cover this case (see Pet. Br. 23-24, 28). Moreover, petitioner fails to defend or justify the doctrine which petitioner attributes to the Board and which it presumably seeks to have applied here (Br. 26). In petitioner's view, the law seems to require an exemption for any independent contractor providing services to an exempt institution if, without those services, the latter could not "function properly" (Br. 24). Apart from this formulation's utter novelty, it warrants noting that this test seems designed simply to exclude *all* service contractors. One might well ask whether an institution would ever contract for services to be performed if it could "function properly" without them.

Board explained that the concession which operated at the race track was an "integral attribute" of the race track in that it was itself part of the diversion and entertainment which the patrons expected and demanded. In sum, in all of the above cases the exemption granted one employer in the contractual relationship was extended to cover the other employer "not because the servicing employer is not a true employer but because what he is doing is of such a nature that the institution would be exempted if it were doing the same thing through its own employees." (*Herbert Harvey, supra,* 128 App. D.C. at 164, 385 F.2d at 686 (McGowan, J., concurring)).

The services performed by Harvey do not fall within the above category. Concededly they are necessary, as are many other services necessary to the proper functioning of a modern institution, such as telephones, electricity, heat and transportation, to name but a few. But the manner in which these services shall be performed need not be coordinated with the Bank's purposes and operations of promoting international trade and development in the way that college and hospital food services must be coordinated with the purposes and functions of those institutions. The substance and nature of the services which Harvey performs are not closely related to or connected with the characteristic operations of the Bank. Indeed, it is difficult to perceive how the services provided here are any different than they would be if the occupant of the building were the First National Bank or any other non-exempt institution.

Thus, contrary to petitioner's contention, the instant case is clearly distinguishable from the cases discussed above, and is much more like *Richmond of New Jersey, Inc.*, 168 NLRB No. 117, 67 LRRM 1113 (1967), and *Bay Ran Maintenance Corp.*, 161 NLRB 820 (1966). In both

Richmond and *Bay Ran*, the Board asserted jurisdiction over an employer providing maintenance and cleaning services to an exempt hospital, finding that those services were not so integrated and interwoven with the purposes and operations of the hospital as to warrant the Board's withholding of jurisdiction.

In *Richmond*, the Board particularly noted the nature of the cleaning operation, the absence of any direct relationship between such housekeeping and patient care, and the fact that Richmond exercised absolute control over labor relations policies and employees' day-to-day performance and work assignments. The fact that such housekeeping operations were necessary and essential to the functioning of the hospital was specifically found not to compel the Board to assert jurisdiction, as was the fact that some of the employer's operations were subject to review and approval of the hospital. The Board found that there were significant distinctions between the situation in *Richmond* and cases such as *Horn & Hardart*, *supra*, "among them the fact that the hospital dietician and staff in *Horn & Hardart* retained direct and complete control over planning and preparation of food and over the time and manner of serving meals—activities intimately associated with essential hospital services to patients." 67 LRRM at 1114.

Similarly, in *Bay Ran*, *supra*, the Board concluded that the employer there was not engaging in activities which were so intimately interrelated with the operation or purposes of the hospital as to warrant withholding the exercise of its jurisdiction. Significantly, the Board noted, the cleaning work performed by Bay Ran had no direct relationship to patient care, since bedpans, sheets and patients' laundry were cleaned by the hospital's own staff, and therefore the activities of the employer were severable and

remote from the exempt activities and had at best only an indirect relationship with the patients.[5]

The foregoing analysis demonstrates that the Board's action in this case was, contrary to Harvey's contention, completely consistent with its past practice in cases of this kind. The fact that there are similarities between those cases in which the Board does assert jurisdiction and those in which it does not is not sufficient to warrant overturning the Board's decision. For the courts have uniformly recognized that the question whether the Board should exercise its jurisdiction in a case where statutory jurisdiction exists is one which should be left to the Board, unless it can be shown that the Board has acted arbitrarily or in a manner which will result in unjust discrimination.[6] And the test for determining whether

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[5]See also, *N.L.R.B. v. Howard Johnson Co.*, 317 F.2d 1 (C.A. 3, 1963), cert. denied, 375 U.S. 920 (upholding Board assertion of jurisdiction over restaurateur on New Jersey Turnpike, an exempt governmental institution); *Local 5, United Ass'n, etc. v. N.L.R.B.*, 116 App. D.C. 100, 321 F.2d 366 (1963), cert. denied, 375 U.S. 921 (upholding Board assertion of jurisdiction over activities of construction contractor at Andrews Air Force base).

Petitioner contends (Br. 26) that the "logic" of the Board's decision in *Specialized Maintenance, Inc.*, Case No. 22-RM-222 (J.A. 121-126), compels the Board to refuse to assert jurisdiction in this case, and that the Board overruled this decision only because this Court found it to be inconsistent with prior Board decisions. However, as the Board pointed out upon remand in the instant case (Supp. A. 8), no record was made in *Specialized Maintenance, Inc.* Therefore, it is not possible to determine the applicability of the principle involved to the facts in that case, or to compare the case with the instant one. For similar reasons, the Board decided to overrule its decision in that case to the extent that it might be considered to conflict with other cases involving the application of the principle, including the instant one.

[6]*N.L.R.B. v. Harrah's Club*, 372 F.2d 425, 427 (C.A. 9, 1966), cert. denied, 386 U.S. 915; *N.L.R.B. v. Wenatchee Thrifty Drugs, Inc.*, 378 F.2d 363, 364 (C.A. 9, 1967); *N.L.R.B. v. Carroll-Naslund Disposal, Inc.*, 359 F.2d 779, 780 (C.A. 9, 1966); *N.L.R.B. v. West Side Carpet Cleaning Co.*, 329 F.2d 758, 760 (C.A. 6, 1964); *N.L.R.B. v. Sightseeing Guides, etc., Local 20076*, 310 F.2d 40 (C.A. 2, 1962); *N.L.R.B. v. Guernsey-Muskingum Elec. Coop., Inc.*, 285 F.2d 8, 11 (C.A. 6, 1960);

or not the Board's action was arbitrary is not whether it has treated employers in similar circumstances differently, but whether the difference in treatment is reasonable under the particular facts involved in each case.[7]

As shown, there are distinct and relevant differences between such cases as *Crotty* and *The Prophet*, on the one hand, and *Bay Ran* and the instant case, on the other. To the extent that these differences draw a fine line, petitioner has no cause for complaint. The need for drawing such a line derives from the fact that the Board is required to accommodate two sometimes conflicting principles: the Congressional decision to exempt the Bank and the statutory policy of encouraging collective bargaining (Supp. A. 6).

Where, as here, the Bank has contracted out its maintenance needs to an otherwise nonexempt employer, the Board must strike a balance between these two principles. By focussing upon the extent to which the contracted-out functions are interwoven with exempt functions, the Board applies a test which is rationally related to the broad statutory considerations involved.[8] Accordingly, it is not an indication of arbitrariness that

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N.L.R.B. v. Chauffeurs, Teamsters, Local 364 (Light Co.), 274 F.2d 19, 24 (C.A. 7, 1960); *N.L.R.B. v. F. M. Reeves & Sons, Inc.*, 273 F.2d 710-711 (C.A. 10, 1959), cert. denied, 366 U.S. 914; *N.L.R.B. v. Pease Oil Co.*, 279 F.2d 135, 138 (C.A. 2, 1960); *N.L.R.B. v. Jones Sausage Co.*, 257 F.2d 878, 879-880 (C.A. 4, 1958); *Optical Workers' Union, etc. v. N.L.R.B.*, 227 F.2d 687, rehearing denied, 229 F.2d 170 (C.A. 5, 1956), cert. denied, 351 U.S. 963; *N.L.R.B. v. Parran*, 237 F.2d 373, 375 (C.A. 4, 1956); *N.L.R.B. v. Gottfried Baking Co.*, 210 F.2d 772, 777-778 (C.A. 2, 1954); *N.L.R.B. v. Stoller*, 207 F.2d 305 (C.A. 9, 1953), cert. denied, 347 U.S. 919.

[7]See, *N.L.R.B. v. Gene Compton's Corp.*, 262 F.2d 653, 656 (C.A. 9, 1959); *N.L.R.B. v. Harrah's Club, supra* at 427; *N.L.R.B. v. W. B. Jones Lumber Co.*, 245 F.2d 388 (C.A. 9, 1957).

[8]Compare the test proposed by petitioner which, as shown *supra*, p. 9, n. 4, would seem always to result in an exemption for the contractor.

the legal results in these cases may well differ from case to case in response to particularized factual differences. On the contrary, this careful differentiation is a firm indicator that Congressional policy is being rationally applied. See *Grain Elevator, Flour & Feed Mill Workers, etc., Local 418 v. N.L.R.B.*, 126 App. D.C. 219, 226, 376 F.2d 774, 781-782 (1967), cert. den., 389 U.S. 932.

C. Harvey exercises effective control over the working conditions of its employees, and is fully competent to bargain with the Union in accordance with the provisions of the Act

In addition to its contention that the Board cannot, consistent with past practice, assert jurisdiction in this proceeding, Harvey also urges that such an exercise of jurisdiction would, under the circumstances presented by this case, amount to an exercise in futility, and thus that the Board should have refrained from asserting jurisdiction in any event. However, we submit that the record amply supports the Board's contrary conclusion.

First, as the Board pointed out, the contract itself clearly indicates that Harvey is regarded by both of the parties as the employer with primary responsibility for the performance of services under the contract. The contract states that Harvey will perform the services "as an independent contractor," will be "solely responsible for the conduct of its employees," and will "hold the Bank harmless from any liability, loss or damage arising out of the conduct of . . . its employees." (Supp. A. 4; J.A. 73). The contract reserves no rights to the Bank, other than the right to perform the services itself "from time to time upon reasonable notice to [Harvey]" (J.A. 71), a reservation which in no way interferes with

Harvey's own authority and which, in any case, has never been invoked so far as the record shows. Instead, the contract obligates Harvey to furnish "complete operating and maintenance service for the building . . . [and to] provide and supervise all personnel necessary for the foregoing services" (J.A. 71). The only restrictions upon this broad power are that Harvey will only be reimbursed for "all reasonable costs" up to an agreed upon amount, and that the services shall be rendered "in an efficient, safe and business-like manner and . . . as economically as sound business judgment warrants" (Supp. A. 45; J.A. 73). These provisions endow Harvey with very broad control over all aspects of its employees' working conditions, and demonstrate that Harvey has the primary and effective responsibility over the employees involved.

In practice also, the record shows that Harvey has exercised a predominant role in regulating the working conditions of the employees. The hiring of employees is handled almost entirely by Harvey, who receives, interviews, and screens applicants, and "in most instances [is] able to clear that applicant and employ them." (J.A. 41). The responsibility over hiring vested in Harvey is considerable, since the turnover rate is exceedingly high—three to five unit workers either quit or fail to appear for work every day (J.A. 27)—and finding replacements is Harvey's responsibility (J.A. 23, 27). The only power which the Bank retains over such hiring is the right to reject applicants who fail to meet Bank security standards. And occasionally, the Bank recommends that a certain applicant be hired, in which case Harvey almost always acquiesces. Otherwise, Harvey has full and complete discretion to handle the problems of hiring.

Likewise, Harvey exercises primary control over the discharge of employees. It is true that Harvey seeks approval from the Bank in about

60% of the cases because there might be a Bank "V.I.P. who . . . liked [the employee]" (J.A. 27). But there is no showing that the Bank has established any standards governing discharges, or that it has ever sought to compel Harvey to retain an employee whom Harvey wished to be discharged. It has occasionally told Harvey to discharge an unsatisfactory employee, and Harvey has always complied without making an independent check (J.A. 27). The other problems of discipline, such as suspending employees or sending them home for drunkenness, have always been handled completely by Harvey (J.A. 27).

Harvey is also predominantly responsible for regulating sick leave and vacations. Generally, an employee is entitled to sick leave after a year's employment; if Harvey does not feel that an employee is entitled to his sick leave, however, it will "pass this along" to the Bank, and the Bank will tell Harvey not to pay the employee (J.A. 36, 47-48). Harvey also determines the vacation schedules of those employees who have worked for a year and are eligible to take a vacation (J.A. 36).

The major restriction upon Harvey's control over the employees is, therefore, that which is inherent in the cost-plus-fixed-fee arrangement. This arrangement prevents Harvey from raising wages or paying sick leave benefits without prior approval from the Bank because such extra expenditures require an adjustment in the budget approved by the parties for Harvey's operations. But the record shows that the normal wage increases are generally granted upon request; and although Harvey's vice-president testified that many requests for individual promotions had been denied, she could not recall the last time that such a denial had occurred (J.A. 32, 45-46). Under these circumstances, the Board was justified in concluding that Harvey's "acquiescence in the World Bank's participation in the hiring,

discharge, and assignment of employees was no more than that which any service company would permit in order to please its clients," and that the Bank's "participation in promotions and the setting of wage scales was no more than an exercise of its right to police the costs being incurred under the contract." (Supp. A. 5).

The fact that the Bank retains some control over the working conditions of the employees involved is not sufficient to preclude the Board from asserting jurisdiction over Harvey. For, as the Board pointed out in its original brief (pp. 14-16), few employers enjoy absolute freedom to grant any requested improvements in working conditions without seeking an adjustment in the market price of their product or services. Managerial decisions are often made subject to contractual arrangements which have been or must be made with other employers. The Supreme Court has also recognized that an employer who does not exercise complete control over the working conditions of his employees can still exercise sufficient control to subject him to the coverage of the Act. In *N.L.R.B. v. E. C. Atkins & Co.*, 331 U.S. 398, 406-414, rehearing denied, 331 U.S. 868 (1947), the Court upheld the Board's assertion of jurisdiction over an employer where the relevant employees were plant guards hired pursuant to War Department regulations enacted to ensure protection of certain strategic premises, materials and utilities from injury and destruction during World War II. Although the War Department reserved the right to veto hiring and firing of any plant guard where such action by the employer might impair the efficiency of the guard force, and the military plant guard officers were authorized to take appropriate action to correct conditions which might result in unsatisfactory performance, the Supreme Court concluded that it did not matter that Atkins was "deprived of some

of the usual powers of an employer, such as the usual power to hire and fire guards and the absolute power to control their physical activities in the performance of their services." (331 U.S. at 413). Finding that a "judgment as to the existence of such a relation for purposes of this Act must be made with more than the common law concepts in mind," the Court held that "where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present." (*Ibid.*).

Similarly, the Board's experience with cost-plus-fixed-fee arrangements is that the contractor may well exercise sufficient control over working conditions of the employees to warrant the Board's assertion of jurisdiction. For instance, in *American Smelting and Refining Co.*, 92 NLRB 1451 (1951), wherein the Board asserted jurisdiction over an employer operating under contract with the Atomic Energy Commission, the employees were hired by the employer subject to security checks by the Government, any increase in wages had to be approved by the Commission, and, in fact, "the Employer's authority in virtually all respects [was] subject to the review and approval of the Federal Government" (92 NLRB at 1452). The Board nonetheless concluded that "there clearly remains with the Employer an area of effective control over labor relations at the plant." (*Ibid.*). Accord: *Great Southern Chemical Corp.*, 96 NLRB 1013, 1014 (1951); *Reynolds Corp.*, 74 NLRB 1622, 1626, 1630-1632, reversed on other grounds, 168 F.2d 877 (C.A. 5, 1948). The fact that the Board made no finding of joint employer relationship in those cases does not meaningfully distinguish them from the instant case; the relevant consideration is not the technical relationship between the exempt organization

and the contractor, but the nature and extent of control which the contractor is able to exercise over the employees. And Harvey clearly exercises as much control over its employees as the contractors in the cases cited. Under these circumstances, as the Supreme Court noted in *Atkins, supra*, at 414: "The responsibility of representing the public interest in such matters and of reaching a judgment after giving due weight to all the relevant factors lay primarily with the Board. . . . In the absence of some compelling evidence that the Board has failed to measure up to its responsibility, courts should be reluctant to overturn the considered judgment of the Board and to substitute their own ideas of the public interest." We submit that there is no such compelling evidence here.

Finally, Harvey relies upon the Fourth Circuit's decision in *Westinghouse Electric Corp. v. N.L.R.B.*, 387 F.2d 542 (1967). In that case, the Court, overruling on rehearing its previous determination, 369 F.2d 891, 897 (1966), held that Westinghouse was not obligated to bargain with the Union which represented its employees over the food prices charged in the plant cafeteria. The major question confronting the Court in that case was whether the prices charged had a sufficient impact upon wages, hours and conditions of employment to bring them within the scope of mandatory bargaining (387 F.2d at 545-550). The Court found that the cafeteria prices had no significant or material relationship to wages, hours and conditions of employment, and therefore were not a mandatory subject of bargaining under Section 8(d) of the Act. The Court then noted (387 F.2d at 550) that Westinghouse had no power to set the prices charged in the cafeteria anyway; they were set by the independent contractor, and the only controls which Westinghouse retained over them were the contractual provisions that such prices be reasonable and that Westinghouse

could cancel the contract upon 60 days notice. While the Board does not disagree with the principle that an employer should not be obligated to bargain about matters essentially unrelated to wages, hours and working conditions and beyond the ambit of the employer's control, that principle is inapplicable here, where the Union is seeking to bargain about wages, hours and working conditions of Harvey's employees, over which Harvey does exercise substantial and effective control.

In sum, we submit that the imposition of a bargaining order would not, under the circumstances of this case, amount to an "exercise in futility." The control which Harvey exercises over the working conditions of its employees is clearly substantial enough that bargaining with the Union could produce agreement with the Union on many, if not most, major problems regarding wages, hours and conditions of employment. "[A]lthough it is not possible to say that a satisfactory solution could be reached, the chances are good enough to warrant subjecting [those problems] to the process of collective negotiation." *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 214 (1964). It would therefore be premature to foreclose those chances on the possibility that Harvey could not bargain with finality on each issue which might arise.

CONCLUSION

For the foregoing reasons, the petition to review should be denied, and the Board's order enforced in full.

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REPLY BRIEF FOR HERBERT HARVEY, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,040

HERBERT HARVEY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review an Order of the National Labor Relations Board

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REPLY BRIEF FOR HERBERT HARVEY, INC.

I. There Are Material Factual Misstatements in the Board's Brief

Although the Board's brief purports to adopt, with only slight modification and addition, the Statement of Facts set forth in Harvey's brief (Bd. Br. 2), factual statements in the Board's brief differ from those in Harvey's. In addition, the Board's brief contains material factual distortions and colorations of the record facts. Some of these inaccuracies are, moreover, in conflict with the factual findings made by the Court itself when this case was first before it. *Herbert Harvey, Inc.* v. *N.L.R.B.*, 128 App. D.C. 162, 385 F.2d

684 (1967). Regrettably, we deem it necessary to point out the following factual misstatements in the Board's brief:

1. The Board's brief states that Harvey's supervisory personnel hire qualified and needed job applicants, subject to the Bank's right to reject any applicant "with a police record" (Bd. Br. 3). The Board's brief further states that "The only power which the Bank retains over . . . hiring is the right to reject applicants who fail to meet Bank security standards" (Bd. Br. 15). However, the Bank's power to reject applicants is not as narrowly circumscribed as the Board's brief states, and, significantly, the Board did not so find (J.A. 91). In fact, the Bank may reject any applicant as to whom there "is anything unusual or out of order" (J.A. 23). Thus, as the Court itself found (*Herbert Harvey, supra*, 128 App. D.C. at 163): "No applicant is hired without specific Bank approval, if Harvey has any doubt as to whether his qualifications meet the Bank's standards."

2. The Board's brief states: "And occasionally, the Bank recommends that a certain applicant be hired, in which case Harvey almost always acquiesces" (Bd. Br. 15). Significantly, no record reference is cited in the Board's brief to support such distorted factual statement. Moreover, there is nothing in the record showing that the Bank's power in this respect is exercised only "occasionally," nor is there any record evidence to support the insinuation in the words "almost always" that Harvey may sometimes choose to disobey the Bank's instructions. For the fact is that when the Bank recommends the hiring of an employee, he is "immediately put . . . on the payroll," without a further check by Harvey (J.A. 24). Thus, according to Harvey's Executive Vice President, "If

I was told to put the person on the payroll, it wouldn't matter about a check or not" (J.A. 24; Harvey Main Br. 8). And the Court has itself found flatly (*Herbert Harvey, supra*, 128 App. D.C. at 163): "At times, the Bank directs Harvey to employ . . . certain individuals."

3. Having set forth the highly inaccurate picture (*supra*) of the Bank's powers with respect to the hiring of employees, the Board's brief states: "Otherwise, Harvey has full and complete discretion to handle the problems of hiring" (Bd. Br. 15). This statement cannot be reconciled with the Court's finding (*Herbert Harvey, supra*, 128 App. D.C. at 163): "Harvey does the actual hiring of personnel, and screens job applicants, who must however satisfy hiring standards *established by the Bank.*" [Emphasis added.] Nor can such statement be reconciled with the fact that the Bank, and not Harvey, fixes the number of service and maintenance employees in the work force at the Bank complex, and that the Bank's "demands" in this respect are "foreign to any other building in Washington [so] that you have to forget about the square footage formula and just put the number of people on that they need or that they want" (J.A. 25, 26).

4. The Board's brief states that Bank officials "on occasion" instruct an employee to clean up "a mess" (Bd. Br. 3). The fact is that a Bank official, Johnson, "*often* orders porters to do certain things that they want done . . . if there [is] a mess in there and he sees a porter, he has authority and he would immediately tell the porter to go and get that cleaned up" (J.A. 20-21). [Emphasis added.] The Court's previous finding in this respect was that "the Bank's managers *frequently* assign tasks directly to maintenance employ-

ees and supervise their performance" (*Herbert Harvey, supra*, 128 App. D.C. at 163). [Emphasis added.]

5. The Board's brief states that Harvey's supervisors have been given the function of "passing upon requests for sick leave and vacation" (Bd. Br. 3). The brief further states that "Harvey also determines the vacation schedules of those employees who have worked for a year and are eligible to take a vacation" (Bd. Br. 16). The fact is, however, that although Harvey supervisors submit vacation lists, "sometimes it is necessary to discuss [the list] with Mr. Donovan's [the Bank's office manager] office . . ." (J.A. 36). And the further fact is that the Bank "makes the decision" as to the payment of sick leave. Thus, Harvey must get the Bank's prior approval before it can deny a sick leave payment, and Harvey may be ordered to pay sick leave even though a Harvey supervisor may question an absence (J.A. 36, 47-48).

6. The Board's brief states with respect to the Bank-Harvey contract that "the contract reserves no rights to the Bank other than the right to perform the services itself 'from time to time upon reasonable notice to [Harvey]' . . ." (Bd. Br. 14). In fact, the contract significantly provides that the Bank may "itself perform or otherwise procure the performance of particular services to be rendered by [Harvey] hereunder" (J.A. 71). Moreover, the Board's brief states that the power thus reserved by the Bank "has never been invoked so far as the record shows" (Bd. Br. 15). In fact, however, in the view of Harvey's Executive Vice President, the Bank's reserved powers are exercised "almost daily" (J.A. 39).

7. The Board's brief acknowledges that Harvey gets the Bank's approval with respect to sixty percent of the people who are discharged, but assigns as the reason for the policy "because there might be a Bank

'V.I.P. who . . . liked [the employee]' " (Bd. Br. 15-16). In fact, the record shows that the V.I.P. situation is only "a reason" for the practice (J.A. 26-27), and therefore indicates that there also are other supporting reasons.

8. The Board's brief states that "there is no showing that the Bank . . . has ever sought to compel Harvey to retain an employee whom Harvey wished to be discharged" (Bd. Br. 16). But Harvey's Executive Vice President testified specifically that should Harvey "want to discharge a porter for some failure to perform his duties according to our specification," Harvey nevertheless "would have to keep him" if the employee had the support of a bank "V.I.P." (J.A. 27).

9. The Board's brief states that the Bank "has occasionally told Harvey to discharge an unsatisfactory employee, and Harvey has always complied without making an independent check" (Bd. Br. 16). The insertion of the limiting word "occasionally" in this context is, however, entirely gratuitous, the record showing only that the Bank has in fact directed the discharge of unsatisfactory employees and that Harvey has complied with the direction (J.A. 27). The Court's finding is that "At times, the Bank directs Harvey . . . to discharge certain individuals" (*Herbert Harvey, supra*, 128 App. D.C. at 163).

10. The Board's brief states: "The other problems of discipline, such as suspending employees or sending them home for drunkenness, have always been handled completely by Harvey" (Bd. Br. 16). In the context of the record, this statement is highly misleading. For, although the record shows that Harvey supervisors indeed have the power to suspend or send an employee home, they exercise the power only as a preliminary, or stop-gap, measure. Thus Harvey's Execu-

tive Vice President testified specifically that if an employee came to work drunk, the Harvey night supervisor "would send him home, and the next day tell me, and then I would have to discuss this with Mr. Donovan [the Bank's office manager] and decide whether he could be dismissed or not" (J.A. 19, 27). Similarly, when two drunks ran over an electric wire or cable, the night supervisor "would only let them go home" (J.A. 27).

11. Referring to the Bank's right to approve wage increases, the Board's brief states that "the record shows that the normal wage increases are generally granted upon request" (Bd. Br. 16). To the extent that this statement implies that the Bank routinely approves overall wage increases requested by Harvey, it is a distortion of the record based on a transposition of words. For the actual fact is that a periodic "regular increase" given individual employees—not a "normal" increase—is "normally" approved by the Bank (J.A. 32). And the fact remains, as the Court found (*Herbert Harvey, supra*, 128 App. D.C. at 163), "Starting wages paid to Harvey's personnel are subject to the Bank's approval, as is any change in overall wage scales. Employees cannot be promoted or receive wage increases unless the Bank approves . . . ." (See Harvey's Main Brief 9, 17, for supporting J.A. references.)

II. Harvey's Contention That It Cannot Engage in Meaningful Collective Bargaining Has Not Been Refuted

The Board's brief rests largely on factual misstatements (see Point I, *supra*) in its attempted refutation (Bd. Br. 14-20) of Harvey's contention that Harvey cannot engage in meaningful collective bargaining with the Union (Harvey Main Br. 13-20). We also

point out the following with respect to the Board's argument on the latter issue:

1. The Board's reliance (Bd. Br. 17-19) on the *Atkins*, *American Smelting*, *Southern Chemical*, and *Reynolds* cases[1] is entirely misplaced. As was detailed at length in Harvey's main brief, pages 15-16, n. 10, each of those cases is factually distinguishable from the instant case: in none of the cases was there present a joint employer relationship; and in each of the cases the exempt government agency performed no, or at most a minimal, employer function with respect to labor relations. Significantly, this latter distinguishing characteristic stands entirely unrefuted, for the Board has said nothing whatever about it in its brief. Instead, the Board has irrelevantly commented that Harvey exercises as much control over its employees as the contractors involved in the distinguishable cases (Bd. Br. 19)—a comment which is wholly beside the point.

2. Attempting to answer Harvey's contention that judicial enforcement must be denied to a bargaining order which requires "the doing of a useless and futile thing"—a contention which is supported by controlling circuit court decisions (see Harvey Main Br. 18-20)—there is set forth at page 20 of the Board's brief a *garbled* and misleading quotation of the dictum in *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 214 (1964): ". . . although it is not possible to say whether a satisfactory solution could be reached, national labor policy

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[1] *N.L.R.B.* v. *E. C. Atkins & Co.*, 331 U.S. 398, *rehearing denied*, 331 U.S. 868 (1947); *American Smelting and Refining Company*, 92 NLRB 1471; *Great Southern Chemical Corporation*, 96 NLRB 1013; *Reynolds Corporation*, 74 NLRB 1622.

is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation." Aside from the fact that the words "national labor policy is founded upon the congressional determination that" do not appear in the Board's purported quotation of the Supreme Court's language, and the fact that the deletion of such words is in no way indicated by appropriate marks in the Board's brief, it is patent that the quoted language has been taken out of its context and is not relevant to the problem at hand. For *Fibreboard* was concerned only with the matter of an employer's obligation to bargain with respect to the "contracting out" of maintenance work; and *Fibreboard* was not concerned, as the Board's brief states, with "major problems regarding wages, hours and conditions of employment."

Thus viewed, the irrelevancy of the *Fibreboard* decision to the issue at hand becomes obvious. The holding in *Fibreboard* that the "contracting out" of work is a statutory subject of bargaining has nothing whatever to do with this case. Nor does the Court's admonition in *Fibreboard* that bargaining is worth a try in the "contracting out" situation even though the attainment of a "satisfactory solution" could only be conjectural, have any pertinency here. For the attainment of such a solution in *Fibreboard* depended only on the parties to the bargaining themselves; and there, no third person, not a party to the bargaining, retained a veto power over any agreement the two negotiating parties might achieve. Here, by contrast, the broad powers retained by a non-negotiating party, the Bank, over the most vital areas of labor-management relations—wages, hours, and promotions—clearly demonstrate the futility of the Board's bargaining order.

3. The reasoning, *supra*, that impels the rejection of the Board's argument based on the *Fibreboard* case likewise impels the rejection of the Board's argument that bargaining in this case would not be futile because employers generally do not have freedom to grant requested improvements in working conditions "without seeking an adjustment in the market price of their product or services," or without considering their contractual arrangements with other persons (Bd. Br. 17). It is true, of course, that market price and contractual arrangements with others could have an impact, subtle or pronounced, upon the position taken by an employer in a normal bargaining relationship between the employer and the union representing his employees. But the decision on whether to yield to the union's requests is for the negotiating employer *alone* to make; and, unlike here, no third person has any veto power whatever over the negotiating employer's ultimate decision concerning the requests.

III. There Has Been No Valid Refutation of Harvey's Contention That the Board Has Not Meaningfully Distinguished the Controlling Board Precedents

As we pointed out in our main brief, pages 20-29, the Board, in its Supplemental Decision (Supp. A. 1-9), did not meaningfully distinguish its controlling decisions in *Crotty Brothers, N.Y., Inc.*, 146 NLRB 755; *The Prophet Co.*, 150 NLRB 1559; and *The Horn & Hardart Company*, 154 NLRB 1368. In the latter cases, as in the instant case, the Board relied only on the ill-defined phrase "intimately connected" to explain its conflicting jurisdictional decisions (see Harvey Main Brief 22-28). Now the Board's attorneys have come up with a rationalization of their own

by which they "draw a fine line" and thereby seek to reconcile the Board decisions (Bd. Br. 8-13). But, as the Supreme Court has cautioned, reviewing courts may not accept appellate counsel's *post hoc* rationalizations for agency action. *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 444 (1965):

> For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would "propel the court into the domain which Congress has set aside exclusively for the administrative agency. . . ."

In any event, the rationale advanced by the Board's attorneys is not at all persuasive. Quoting from Judge McGowan's concurring opinion when this case was first before the Court (*Herbert Harvey, supra*, 128 App. D.C. at 164), the Board's attorneys explain that the exemptions granted by the Board to the food service employers in the *Crotty*, *Prophet*, and *Horn & Hardart* cases[2] was extended from the exempt institution "not because the servicing employer is not a true employer but because what he is doing is of such a nature that the institution would be exempted if it were doing the same thing through its own employees"

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[2] In their brief, the Board's attorneys also cite *Massachusetts Institute of Technology*, 152 NLRB 598, and *University of Miami, Institute of Marine Science Division*, 146 NLRB 1448, as illustrating the application of the "intimately connected" principle (Bd. Br. 7-8). But these cases are inapposite to the matter before the Court, as neither presented an issue involving the Board's assertion of jurisdiction over a contractor performing a service for an exempt institution.

(Br. Br. 10). However, in their very next sentence, the Board's attorneys state flatly: "The services performed by Harvey do not fall within the above category" (Br. Br. 10).

The distinction drawn by the Board's attorneys is mistifying, if not ridiculous. Are the Board's attorneys implying that the institutions involved, the college in *Crotty*, the university in *Prophet*, the hospital in *Horn & Hardart*, would not be exempt from the Board's jurisdiction if a union were seeking to represent the institutions' "own employees" who were performing a maintenance, and not a food service, function? Or do they mean that the Bank in this case would not be exempt if it, "through its own employees," did the service and *maintenance* work at the Bank complex? Plainly, such results would be absurd, and the Board has in fact ruled to the contrary. See *The Leland Stanford Junior University*, 152 NLRB 704 (1965), where the Board refused to assert jurisdiction over a department at Stanford University and the union was seeking to represent a unit of craft shop *maintenance* employees employed by the department. See also *Iowa State Memorial Union*, 55 LRRM 1362 (1964), where the Board in an administrative action sustained a regional director's dismissal of a union's representation petition for a unit of *maintenance* employees of a student union nonprofit corporation at Iowa State University. In short, as the Board would not assert jurisdiction over the Bank had it not contracted out its maintenance needs, Harvey, in view of the circumstances and the Board's other decisions, is, in Judge McGowan's words, "being treated differ-

ently to a degree that approaches the arbitrary" (*Herbert Harvey, supra*, 128 App. D.C. at 164).

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